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NTSB Order No. EA-4145

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of April, 1994

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,

Complainant,

Docket SE-11300

v.

SYSTEMS-INTERNATIONAL AIRWAYS, INC.,

Respondent.

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,

Complainant,

Docket SE-12463

v.

SYSTEMS-INTERNATIONAL AIRWAYS, INC.,

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decisions issued by the law judges in these two separate proceedings.' In

¹ Attached are excerpts from the transcripts of proceedings containing the oral initial decisions.

SE-11300, after a full evidentiary hearing held on March 31 and April 1, 1992, Chief Administrative Law Judge William E. Fowler, Jr. affirmed an order revoking respondent's air carrier operating certificate (ACOC), based primarily on its use of unqualified crewmembers on one flight, and its allegedly false representations to the FAA regarding crewmembers' training.² Respondent's appeal from that initial decision stayed the effectiveness of the revocation. Subsequently, in SE-12463, after a hearing limited to sanction³ held on September 29, 1992, Administrative Law Judge William R. Mullins affirmed another order revoking respondent's ACOC, based on its lack of full time management personnel, qualified crews, or qualified aircraft to conduct part 121 air carrier operations.⁴

² The order of revocation contained several additional allegations, which were characterized by counsel for the Administrator as "lesser" or "minor" charges. (Tr. 16.) Based on all of the allegations, respondent was charged with violating 14 C.F.R. §§ 121.401(a)(4), 91.4 [now remodified as 91.5], 61.59(a)(2), 121.433(a), and 121.434(a). These regulations are set forth in the Appendix.

Even though the law judge dismissed some of the falsification charges, he found that revocation was still warranted by the violations he found established (including one falsification charge).

³ The law judge issued an order limiting the hearing to the issue of sanction after respondent failed to file an answer to the complaint, or to respond to the Administrator's motion for judgment on the pleadings or to limit the hearing to sanction. Respondent does not challenge the law judge's decision to so limit the hearing.

⁴ The order alleged that respondent failed to meet the requirements of 14 C.F.R. 121.59 and 121.51(a)(3). The order also cited section 121.53(c), which permits the Administrator to suspend or revoke an ACOC for any cause that would have been grounds for denying an application for that certificate. These regulations are set forth in the Appendix.

On appeal,⁵ respondent does not directly challenge the regulatory violations and deficiencies found in these two cases, or dispute the underlying facts. Rather, respondent argues that, in SE-11300 the law judge erred in not dismissing the complaint as stale under section 821.33(a) of our rules of practice (49 C.F.R. 821.33(a)), or, in the alternative, in not making a specific determination under section 821.33(b) that an issue of lack of qualification was presented and offering respondent a hearing on that issue only.⁶ Regarding SE-12463, respondent

⁵ Respondent is represented by counsel in these appeals. However, it appeared at the hearings pro se, through its general manager, Richard O. Wheeler.

⁶ Section 821.33 provides, in pertinent part:

§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

*

(b) In those cases where the complaint alleges lack of qualification of the certificate holder:

(1) The law judge shall first determine whether an issue of lack of qualification would be presented if any or all of the allegations, stale and timely, are assumed to be true. If not, the law judge shall proceed as in paragraph (a) of this section.

(2) If the law judge deems that an issue of lack of qualification would be presented by any or all of the allegations, if true, he shall proceed to a hearing on the

(continued. ...)

argues that the law judge erroneously believed he was powerless to modify the sanction sought in the Administrator's order, and asks us to substitute, in place of the revocation affirmed in that case, a suspension until such time as respondent is deemed qualified by the FAA. For the reasons discussed below, we find no merit to either of respondent's appeals, and deny them both. The initial decisions are affirmed.

SE-11300 - Stale complaint.

The Administrator does not deny that the complaint in this case was "stale," in that it contained allegations of offenses which occurred more than six months prior to the Administrators notification to respondent of the reasons underlying this proposed certificate action. However, he contends that the motion to dismiss stale allegations was properly denied under subsection (b) of section 821.33 (pertaining to complaints alleging a lack of qualification) , because the complaint raised a legitimate issue of lack of qualification. The law judge who denied the motion⁷ made clear that she was evaluating the motion under subsection (b), rather than (a) (which requires the Administrator to show good cause for the delayed notice, or that

⁶(... continued)

lack of qualification issue only, and he shall so inform the parties. The respondent shall be put on notice that he is to defend against lack of qualification and not merely against a proposed remedial sanction.

⁷ The order denying respondent's motion to dismiss stale allegations was issued by Administrative Law Judge Joyce Capps, to whom this case was temporarily assigned prior to its assignment to Judge Fowler.

imposition of a sanction for the stale charges is warranted in the public interest, in order to defeat a motion to dismiss a stale complaint when the complaint does not allege lack of qualification), by holding that the allegations at issue "pertain to alleged falsification, which is the type of subject matter that inherently present [sic] an issue of lack of qualifications. [Citing case law.]"⁸

Respondent argues that subsection (b) is inapplicable because the order of revocation, as originally drafted, did not contain an explicit allegation that respondent lacked qualification. Respondent reasons that the complaint had to be evaluated under subsection (a) of the rule, rather than (b) . We note that, although the Administrator amended the complaint to include an explicit allegation that respondent lacked qualification, the law judge made no reference to that amendment in her denial of the motion to dismiss. Further, the Administrator asserts, and we agree, that the amendment was unnecessary because an order of revocation implicitly alleges a lack of qualification. We held as much in Administrator v. Johnson, NTSB Order No. EA-3929 at 5 (1993):

. . . [T]he absence of language in the complaint expressly alleging a lack of qualification [did not] preclude[] the

⁸ Although not directly relevant to this appeal, we note that in determining whether the complaint presented an issue of lack of qualification, the law judge should have evaluated the charges in the complaint in the aggregate. Administrator v. Konski, 4 NTSB 1845, 1847 (1984). It is not clear from her order whether she did so. However, the error, if any, appears to have been harmless in his case since the law judge considered the entire complaint at the hearing.

law judge from reaching the question of whether the substance of the complaint presented such an issue. The Board has made clear that a lack of qualification must be shown in order to support the sanction of revocation. [Footnote citing Administrator v. Salkind, 34 CAB 933, 937 (1961) and Administrator v. Niolet, 3 NTSB 2846, 2849-50 (1980).] Accordingly, a complaint which seeks revocation inherently alleges a lack of qualification.

In sum, respondents motion to dismiss was properly considered and denied under subsection (b) of our stale complaint rule. Moreover, by that denial, respondent was put on adequate notice that the hearing on the charges in the complaint would pertain to respondent's alleged lack of qualification. We find no merit to respondent's apparent position that an additional, or different type of notice and/or hearing was required under the rule.⁹

SE-12463 - Substitution of indefinite suspension for revocation.

In light of our affirmance of the order of revocation in SE-11300, our consideration of this second revocation action is somewhat unnecessary. Nonetheless, we have carefully evaluated the record in that case and find ourselves in agreement with the law judge that revocation, rather than an indefinite suspension, is the appropriate sanction for respondent's admitted lack of qualification.

⁹ See Administrator v. Potanko, NTSB Order No. EA-3937 (1993) (section 821.33(b) does not require a specific notice that respondent will have to defend against a lack of qualification, denial of motion to dismiss stale complaint is enough). See also, Administrator v. Schoppaul, NTSB Order No. EA-3410 at 7, n. 7 (1991), where we suggested that section 821.33(b) (2) does not require a preliminary hearing on the issue of lack of qualification when such a hearing would serve no useful purpose.

The allegations in the complaint, deemed admitted in light of respondent's failure to file an answer, established that respondent had not conducted any part 121 air carrier flights since July 1988; had canceled flight checks due to lack of funds; had not submitted necessary management personnel, flight crews, or aircraft for FAA approval; and was conducting no business at its principal business office. Accordingly, it is undisputed that respondent did not meet the requirements to hold an air carrier certificate set forth in 14 C.F.R. 121.59 and 121.51(a) (3) .

At the hearing, the parties stated their respective positions regarding sanction, but neither party presented any evidence. Respondent, appearing through its general manager, conceded that it had shut down operations, and indicated that it would agree to a temporary suspension of its ACOC, presumably until such time as its deficiencies were resolved. (Tr. 16-17.) Other than an unsworn assertion by respondents general manager that respondent still owns at least one qualifying aircraft (Tr. 24-25) , there is no substantiation in the record for respondent's position on appeal that it now possesses all of the personnel, equipment, and facilities necessary to qualify for an ACOC.

The Administrator urged the law judge to affirm revocation, citing Administrator v. Sun Airlines, 1 NTSB 1859 (1972) , a case where we affirmed the Administrator's emergency revocation of an ACOC where the company lacked an acceptable aircraft or aircraft

inspection program, citing in particular that part of our decision where we said:

[T]he fact that respondent might be able to demonstrate its qualifications at some point in the undefined future by obtaining a suitable aircraft and formulating an acceptable inspection program is not a valid reason for reinstating its certificate. The Board's decision herein must be rendered on the basis of the record as currently constituted, which clearly shows respondent's lack of qualifications. Any change in respondents capability to comply with the regulations and other requirements of an air taxi operator is a matter between respondent and the FAA at such time as it reapplies for an ATCO certificate.

The law judge affirmed the revocation, finding that "it is clear under the evidence that [respondent] does not qualify to hold a certificate because they lack these things . . . [and I] have no other option in this case but to sustain the order of revocation ." (Tr. 29.) . It is clear from the record as a whole that, contrary to respondent's assertion on appeal, the law judge did not think he was bound from the beginning to affirm revocation. If this were so there would have been no need to hold a hearing limited to sanction only. Indeed, the law judge noted at the start of the hearing that section 121.53(c) authorizes the Administrator to *suspend* or revoke an ACOC for any cause that would have been grounds for denying the certificate. (Tr. 8.) However, in view of the arguments and evidence (or lack of evidence) presented at the hearing, the law judge apparently determined that revocation was the only proper sanction in this case.

In sum, revocation of respondent's ACOC is both authorized by regulation (section 121.53(c)) , and supported by case law.¹⁰ Because respondent has not established any reason why a different sanction should have been imposed under the circumstances of this case, we have no basis to reverse the law judge's affirmance of that sanction.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeals are denied;
2. The initial decisions are affirmed; and
3. The revocation of respondent's air carrier operating certificate shall commence 30 days after the service of this opinion and order."

VOGT , Chairman, LAUBER, HAMMERSCHMIDT and HALL, Members of the Board, concurred in the above opinion and order.

¹⁰ We have held that revocation is the appropriate sanction when a carrier has terminated its operations, or lacks the qualifications necessary to hold its certificate. See Administrator v. Air Illinois, Inc., 6 NTSB 436 (1988); and Administrator v. Petecraft Aviation Services, Inc., 5 NTSB 2360 (1987) .

¹¹ For the purpose of this opinion and order, respondent must physically surrender its certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

§ 91.5 Pilot in command of aircraft requiring more than one required pilot.

No person may operate an aircraft that is type certificated for more than one required pilot flight crewmember unless the pilot in command meets the requirements of §61.56 of this chapter.

§ 61.59 Falsification, reproduction, or alteration of application, certificate, logbooks, reports, or records.

(a) No person may make or cause to be made-

* * *

(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, or any certificate or rating under this part;

§ 121.401 Training program: General.

(a) Each certificate holder shall:

* * *

(4) Provide enough flight instructors, simulator instructors, and approved check airmen to conduct required flight training and flight checks, and simulator training courses permitted under this part.

§ 121.433 Training required

(a) *Initial training.* No certificate holder may use any person nor may any person serve as a required crewmember on an airplane unless that person has satisfactorily completed, in a training program approved under subpart N of this part, initial ground and flight training for that type airplane and for the particular crewmember position, except as follows:

(1) Crewmembers who have qualified and served as a crewmember on another type airplane of the same group may serve in the same crewmember capacity upon completion of transition training as provided in §121.415.

(2) Crewmembers who have qualified and served as second in command or flight engineer on a particular type airplane may serve as pilot in command or second in command, respectively, upon completion of upgrade training for that airplane as provided in § 121.415.

§ 121.434 Operating experience.

(a) No certificate holder may use a person nor may any person serve as a required crewmember on an airplane unless he has completed, on that type airplane and in that crewmember position, the operating experience required by this section, except as follows:

(1) Crewmembers other than pilots in command may serve as provided herein for the purpose of meeting the requirements of this section.

(2) Pilots who are meeting the pilot in command requirements may serve as second in command.

§ 121.51 Issue of certificate.

(a) An applicant for a certificate under this subpart is entitled to the certificate if he is a citizen of the United States and the Administrator, after investigation (including any necessary verification of financial and other information submitted) finds that the applicant-

* * *

(3) Is properly and adequately equipped and able to conduct a safe operation in accordance with the requirements of this part and the operations specifications provided for in this part.

§ 121.53 Duration of certificate.

* * *

(c) The Administrator may suspend or revoke a certificate under section 609 of the Federal Aviation Act of 1958 and the applicable procedures of part 13 of this chapter for any cause that, at the time of suspension or revocation, would have been grounds for denying an application for a certificate.

§ 121.59 Management personnel required.

(a) Each applicant for a certificate under this subpart must show that it has enough qualified management personnel to provide the highest degree of safety in its operations and that those personnel are employed on a full-time basis in the following or equivalent Positions:

- (1) General manager.
- (2) Director of operations (who may be the general manager if qualified).
- (3) Director of maintenance.
- (4) Chief pilot.
- (5) Chief inspector.

(b) Upon application by the supplemental air carrier or commercial operator the Administrator may approve *different positions or numbers* of positions than those listed in paragraph (a) of this section for a particular operation if the air carrier or commercial operator shows that it can perform the operation with the highest degree of safety under the direction of fewer or different categories of management personnel due to-

- (1) The kind of operation involved;
- (2) The number and type of aircraft used; and
- (3) The area of operations.

The title and number of positions so approved are set forth in the operations specifications of the air carrier or commercial operator.

(c) Each supplemental air carrier and commercial operator shall-

(1) Set forth the duties, responsibilities, and authority, of the personnel required by this section, in the general policy section of the air carrier manual or commercial operator manual;

(2) List in the manual the names and addresses of the persons assigned to those positions; and

(3) Within at least 10 days, notify the FAA Flight Standards District Office charged with the overall inspection of the air carrier or commercial operator, of any change made in the assignment of persons to the listed positions.